YAP TECK NGIAN

v.

MOBIL OIL MALAYSIA SDN BHD

HIGH COURT MALAYA, TEMERLOH
RAMLY ALI JC
[APPEAL NOS: 12-30-2000 & 12-30A-2000]
3 AUGUST 2001

CIVIL PROCEDURE: *Jurisdiction - Setting aside judgment in default of appearance - Whether sessions judge has discretion - Whether judgment could be set aside despite proper service - Subordinate Courts Rules 1980, O. 1 r. 6, O. 28 r. 8*

LAND LAW: *Indefeasibility of title and interests - Letters of administration - Whether conclusive proof of deceased's ownership of land*

BANKRUPTCY: *Capacity of bankrupt - Action commenced by administrator of deceased bankrupt's estate - Whether sanction of Official Assignee required - Bankruptcy Act 1967, s. 38(1)(a)*

CIVIL PROCEDURE: *Judgment - Setting aside - Whether respondent waived right to set aside default judgment by entering into consent judgment*

EVIDENCE: *Estoppel - Consent judgment - Whether respondent estopped from setting it aside - Whether appellant guilty of unconscionable conduct*

The appellant, as the administrator of the estate of his late father ('the deceased'), obtained a judgment in default of appearance ('default judgment') against the respondent in relation to a piece of land ('the said land') that had been leased to the respondent by the deceased. The respondent applied to set it aside and when the said application came before the court, the parties agreed to a consent judgment. After the consent judgment was recorded, the respondent received a notice from the Official Assignee ('OA') that the deceased was an undischarged bankrupt when he died. On that ground, the respondent then filed two applications to set aside the default judgment and the consent judgment and the sessions judge allowed the applications. The appellants now appeal against the decision of the sessions judge allowing the said applications.

The issues were: (i) whether the sessions judge had the jurisdiction to set aside the default judgment; (ii) whether the Letters of Administration granted to the appellant were conclusive proof of the deceased's ownership of the said land; (iii) whether it was proper for the appellant to have commenced the action

against the respondent without the sanction of the OA; (iv) whether the respondent waived its right to set aside the default judgment by virtue of the consent judgment; and (v) whether the respondent was estopped from disputing the consent judgment after having agreed to it.

Held:

[1] Order 28 r. 8 Subordinate Courts Rules 1980 ('SCR') clearly empowers the court to set aside any judgment in default of appearance on the application of the relevant party. Order 1 r. 6 SCR defines the word "court" as a Sessions Court or a President whether sitting in court or in chambers and includes in cases where he is empowered to act as a magistrate. Further, authorities also show that the sessions judge had the jurisdiction to set aside the judgment in default of appearance obtained by the appellant.

[2] There are authorities to show that even if service of a summons and statement of claim is good in law, a judgment in default of appearance may be set aside if the court is satisfied that there is a defence on the merits.

[3] Even though the appellant was granted the Letters of Administration in respect of the estate of the deceased, that was not conclusive proof that the property in the schedule to the grant thereof was owned by the deceased. Applying the principle laid down in the case of *Chua Chee Chor v. Chua Kum Yeng*, the respondent or any interested party may question the actual ownership of the property which was a triable issue to be determined at a full trial.

[4] The deceased was an undischarged bankrupt whose assets and liabilities were vested with the OA. It followed that only the OA had the *locus standi* to deal with any matter relating to his assets and liabilities. Those who wish to deal with his assets and liabilities could only do so with the consent of the OA. As that issue was vital to determine the *locus standi* of the appellant, it was therefore a triable issue to be heard at the trial proper.

[5] By entering into the consent judgment, the respondent could not be said to have taken a fresh step inconsistent with its application to set aside the default judgment. That was because there was a provision therein that the default judgment should be set aside. In fact, the respondent entered into the consent judgment with the purpose of setting aside the default judgment. As such, the respondent had not waived its right to set aside the default judgment.

[6] The sessions judge had the power to set aside the consent judgment on the ground that there was a mistake regarding the status of the deceased as an undischarged bankrupt at the time of his death. Further, the consent judgment was not perfected yet. Also, the respondent had no knowledge that the deceased was an undischarged bankrupt when the consent judgment was entered into. To proceed with the consent judgment under the circumstances might contravene the Bankruptcy Act 1967.

[7] The appellant was the son and the administrator of the estate of the deceased. He should have known that his late father was an undischarged bankrupt at the time of his death. There was nothing to indicate that he had no knowledge of the said matter. In not disclosing that his late father was an undischarged bankrupt at the time of his death, the appellant was guilty of unconscionable conduct which had the effect of releasing the respondent from any estoppel raised.

[Appeals dismissed.]

Case(s) referred to:

Chua Chee Chor v. Chua Kum Yeng [1960] 26 MLJ 127 ***(foll)***
Gan Kim Huat Bros Realty Sdn Bhd v. Leang Ah Kan [1983] 1 CLJ 298 ***(foll)***
Huddersfield Banking Co Ltd v. Henry Lister & Son Ltd [1895-1899] All ER 868 ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(refd)***
Malayan United Bank Bhd v. Mohammed Salleh Mohammed Yusoff & Ors [1988] 2 CLJ 460; [1988] 1 CLJ (Rep) 762 ***(refd)***
Ong & Co Pte Ltd v. Ong Say Yaun [1984] 1 CLJ 188; [1984] 2 CLJ (Rep) 290 ***(foll)***
Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd [1985] 2 CLJ 97; [1985] CLJ (Rep) 760 ***(foll)***
Seok Mee Seong v. Abdul Wahab Abdul Rahman [1988] 2 CLJ 694; [1988] 2 CLJ (Rep) 415 ***(refd)***
Syarikat Marak Jaya Sdn Bhd v. Masinda Sdn Bhd [1991] 1 CLJ 809; [1991] 4 CLJ (Rep) 22 ***(foll)***
Rachman v. Tabrum [1923] 39 LTR 380 ***(foll)***
Tan Lee Siang & Ors v. Kenneison Brothers Sdn Bhd [1999] 3 CLJ 422 ***(foll)***
Ting Nguk Yong v. Bank Utama (M) Bhd [1999] 1 CLJ 173 ***(refd)***
Tio Chee Hing v. Tractors Malaysia Bhd [1973] 1 MLJ 66 ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, s. 38(1)(a)
Subordinate Courts Rules 1980, O. 1 r. 6, O. 28 r. 8, O. 29 r. 14

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol 17(2), p 114, para 201

For the appellant - Amri Mohd Sham; M/s Yap Liew & Partners
For the respondent - Shirlena Yogeswaran (Mong Chung Heng); M/s Shearn Delamore & Co

Reported by Usha Thiagarajah

JUDGMENT

Ramly Ali JC:

There are two separate appeals filed by the appellant, namely:

i) *vide* Appeal No: 12-30-2000, against the decision of the learned Sessions Court judge Temerloh dated 1 December 2000 for setting aside a judgment in default which was made against the respondent (defendant) on 25 August 2000; and

ii) *vide* Appeal No: 12-30A-2000, against the decision of the same Sessions Court judge dated 1 December 2000 for setting aside a consent judgment which was made on 23 September 2000.

These grounds of judgment are in respect of both appeals.

The Appellant's (Plaintiff) Claim

The appellant (as the administrator of the estate of his late father, one Yap Hong Kai – deceased) had filed his statement of claim in the Sessions Court Temerloh (*vide* Summon No: 52-303-2000) for an order:

a) that the defendant to deliver vacant possession of a piece of land known as GM 210 Lot 432, Seksyen 9, Sungai Ara, Mukim Mentakab, Pahang;

b) that the defendant to pay double rent (under the Civil Law Act 1956) from 1 October 1999 until the date of vacant possession of the said land;

c) general damages;

d) cost; and

e) such other reliefs as the court deems just and fit.

Relevant Facts

Sometime on 1 October 1986, the appellant's late father, Yap Hong Kai (deceased) as the administrator of the estate of Yap Swee King @ Yap Swee Kim @ Yap Swee Keng, had entered into an agreement with the defendant (respondent) whereby the said land was leased to the respondent for a period of 15 years for the respondent to carry out its petrol pump station business. As a consideration the respondent had paid a sum of RM300,000 (in one lump

sum) at the beginning of the tenancy. The said tenancy started on 1 October 1984 and ended on 30 September 1999. The said land, at all material times was registered under the name of Yap Swee King @ Yap Swee Kim @ Yap Swee Keng (deceased), who was the father of Yap Hong Kai (deceased) and the grandfather of the appellant.

As a result of the agreement, the respondent, at his own costs, had constructed a petrol pump station on the said land and appointed his agent to carry out it's business there. The tenancy ended on 30 September 1999. The said Yap Hong Kai (deceased) died long before that date. Apparently, there were negotiations between the parties regarding the extension of the tenancy after the expiry date. There were also confusions as to who was the actual owner of the said land after the death of Yap Hong Kai (deceased), as the said land was still registered under the name of Yap Swee King @ Yap Swee Kim @ Yap Swee Keng (deceased) and has not been distributed among the beneficiaries by the said Yap Hong Kai (deceased) as the administrator.

On 22 July 2000 the appellant filed in his summons and statement of claim against the respondent at the Session Court Temerloh *vide* Summon No: 52-303-00. The summons and statement of claim were duly served on the respondent at its registered address at Wisma Goldhill, Kuala Lumpur on 1 August 2000. At that time the respondent was in the midst of shifting office to another premises, namely Menara Esso, also in Kuala Lumpur. On 12 September 2000 the respondent was informed that a judgment in default of appearance was obtained by the appellant against the respondent in the Sessions Court Temerloh on 25 August 2000 in respect of the said Summons No: 52-303-00. On 23 September 2000 the respondent, through its solicitors, had filed in its application to set aside the said judgment in default on the ground that at the time when the summons and statement of claim were served at their registered office at Wisma Goldhill, the respondent was so busy in the process of shifting office to Menara Esso and it had overlooked about it. There was evidence to show that with effect from 7 August 2000 the respondent was officially at the new address at Menara Esso. When the said application to set aside the judgment in default came before the court, the parties have agreed to enter a consent judgment to the effect, *inter alia* that, the respondents to surrender vacant possession of the said land. However, the draft order in respect of the consent judgment has not been sealed and not extracted as the parties could not agree on certain terms in the judgment. The draft copy was not signed by both parties and not approved and sealed by the court.

In the mean time, after the consent judgment was recorded, the respondent received a notice dated 2 October 2000 from the official assignee's office informing the respondent that the said Yap Hong Kai (deceased) was an undischarged bankrupt when he died.

On order of adjudication against the deceased Yap Hong Kai was made by the Kuala Lumpur High Court on 30 April 1979. Paragraph 4 of the said notice says:

> 4. Berikutan dengan Perintah Penghukuman yang dibuat terhadap si bankrap di atas, maka Pegawai Pemegang Harta adalah yang mempunyai hak *locus standi* kepada apa jua 'harta' si bankrap dan segala pembayaran sewa dan lain-lain gantirugi dibayar kepada Jabatan ini dari faedah pemiutangnya.

Immediately after receiving the said notice from the official assignee's office, the respondent, on 6 October 2000 filed in another application in the Sessions Court Temerloh to set aside the consent judgment recorded on 23 September 2000 on the ground that the said consent judgment was invalid as the said Yap Hong Kai (deceased) was an undischarged bankrupt when he died. Thus the estate of the said Yap Hong Kai (deceased) should be vested in and administered by the official assignee, not by the appellant. On 1 December 2000, the learned Sessions Court judge Temerloh allowed both the application made by the respondent whereby the judgment in default dated 25 August 2000 and consent judgment dated 23 September 2000 were set aside. Hence, the appellant filed both appeals against the said decisions.

Application To Set Aside Judgment In Default of Appearance

The appellant argued that the learned Sessions Court judge has no power to set aside the judgment in default as there is nothing in the Subordinate Courts Rules 1980 ('SCR') to provide for such an action. The appellant contended that the proper action was to appeal against the decision to the High Court. With respect, I do not agree with the appellant's argument on this issue. Order 28 r. 8, SCR 1980 clearly empowers the court to set aside any judgment in default of appearance, on application of the relevant party. The said O. 28 r. 8 provides:

> (1) Any judgment or order obtained where one party does not appear at the hearing may be set aside by the Court, on the application of that party, on such terms as it thinks just.

Order 1 r. 6 SCR 1980, defined the word "court" as a Sessions Court or a President whether sitting in court or in chambers and includes, in cases where he is empowered to act, a magistrate.

In *Tan Lee Siang & Ors v. Kenneison Brothers Sdn Bhd* [1999] 3 CLJ 422, KC Vohrah J held:

> If judgment or dismissal is made because either a party or his counsel is absent, and not because there is a hearing on the merits, and there should be allowed an application to the Court by the party or whose counsel was absent to set aside any judgment or order made under O. 28 r. 7 of the SCR. The party has *locus standi* under O. 28 r. 8 to apply to set aside the judgment or order of dismissal.

In *Rachman v. Tabrum* [1923] 39 LTR 380 at p. 381, Lord Chief Justice Heward had said:

> The principle is where a summon to case has not been heard, but merely struck out, the court may if it thinks fit, hear or entertain the summon or case, but if there has been a hearing on the merits, though in the absence of one party, it cannot do so after the order is perfected.

On the above provisions and authorities, I am of the view that the learned Sessions Court judge has a jurisdiction to hear the application made by the respondent and accordingly to make an order to set aside the judgment in default of appearance obtained by the appellant earlier.

On the question of service of the summons and statement of claim on the respondent, the respondent did not dispute that the service was good in law. What the respondent is saying that at the material times when the summons and statement of claim were served at its registered office at Wisma Goldhill, the respondent was so busy and occupied in their preparation to shift office. Thus, it's officer was not aware of the summons and statement of claim and its failure to enter appearance was not intentional. The first time the respondent became practically aware about the summons was on 12 September 2000, when its agent who was operating the petrol station on the said land informed that a judgment in default was obtained against the respondent by the appellant on 25 August 2000. So the respondent had taken an immediate step to file an application to set aside the judgment in default on 23 September 2000. The respondent has done what is expected as provided under O. 29 r. 14 SCR 1980 which provides that a party intending to set aside or to vary such order or judgment must make his application to the court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or the judgment. In *Gan Kim Huat Bros. Realty Sdn. Bhd. v. Leang Ah Kan* [1983] 1 CLJ 298, Peh Swee Chin J at p. 299 had this to say:

> In practice any request or application to set aside a default judgment should normally be readily granted by the Court unless the Plaintiff's absence was either intentional or contumacious.

There are authorities to show that eventhough service of the summons and statement of claims is good in law, a judgment in default of appearance may be set aside if the court is satisfied that there is a defence on merits.

In *Seng Huat Hang Sdn Bhd. v. Chee Seng & Co Sdn Bhd* [1985] 2 CLJ 97, Edgar Joseph Jr. had said:

> What I consider however to be crucial in application of this sort is whether there was evidence before the Court disclosing a *prima facie* defence to the Plaintiff's claim for possession or, in other words, a defence on the merits. For this purpose, the applicant need only disclose an arguable or triable issue or, in other words, an arguable case which ought to go for trial.

In *Malayan United Bank Bhd. v. Mohammed Salleh bin Mohammed Yusoff & Ors* [1988] 2 CLJ 460, Zakaria Yatim J, had also held that:

> The important consideration in an application to set aside judgment in default is whether there is a defence on the merits. The question of delay is a secondary matter.

In another case, *Seok Mee Seong v. Abdul Wahab bin Abdul Rahman* [1988] 2 CLJ 694, Mustapha Hussain J shared the same view. At p. 696 he had said:

> In an application to set aside a judgment in default, the explanation as to why the defendant or his counsel was absent is relevant but not the deciding factor. What is important or crucial is whether there is a defence on the merits. The draft defence enclosed with the application discloses triable issues within the meaning of *Evans v. Bartlam*. The learned Magistrate should have allowed the application to set aside and leave to the applicant to defend the action subject to the applicant paying costs.

In the present case, I have scrutinised the draft statement of defence of the respondent and satisfied that there are triable issues which ought to be tried. There is a *prima facie* defence on the merits. The triable issues are as follows:

a) Issue Relating To Ownership Of The Said Land

The appellant is saying that there is no dispute that the said land was owned by the estate of Yap Hong Kai (deceased) where he (the appellant) is the administrator *vide* a letter of administration dated 2 February 1996. In actual fact the said land is still registered under the name of Yap Swee King @ Yap Swee Kim @ Yap Swee Keng (deceased) ie, the late father of the said Yap Hong Kai (deceased) and the grandfather of the appellant. The said Yap Hong Kai (deceased) was the administrator of the estate of Yap Swee King @ Yap Swee Kim @ Yap Swee Keng (deceased). When the said Yap Hong Kai (deceased) died, the estate of Yap Swee King @ Yap Swee Kim @ Yap

Swee Keng (deceased) was not fully and completely administered. In other words, at the time of his death, the said land was not owned by the said Yap Hong Kai (deceased). Thus, the appellant, being an administrator of the estate of Yap Hong Kai (deceased), cannot claim ownership or right over the said land. If the appellant wished to administer the said land (which is still remained in the estate of Yap Swee King @ Yap Swee Kim @ Yap Swee Keng) the appellant should have obtained another letter of administration described as *"de bonis non"*. The present letter of administration which was granted to the appellant on 2 February 1996 is only in respect of the estate of the said Yap Hong Kai (deceased) and only applicable for properties belonged to the said Yap Hong Kai (deceased) personally. *Halsbury's Laws of England* (4th edn) vol. 17(2), para 201 at p. 114 states:

> Where a sole or last surviving executor dies intestate without having fully administered the testator's estate, the deceased executor's administrator does not become the representative of the original testator, and it is accordingly necessary to appoint an administrator to administer the goods of the original testator left unadministered. This is a grant of administration *cum testamento annexo de bonis non administratis* (that is, 'with the will annexed for unadministered estate').
>
> A grant for the administration of unadministered estate is also made where the deceased dies intestate and the original administrator did not complete the administration of the estate. Both types of grant are described as '*de bonis non*'.

In *Chua Chee Chor v. Chua Kum Yeng* [1960] 26 MLJ 127, Thomson CJ held:

> when the Court grants Letters of Administration it does not go into questions of title as to the assets alleged to be the property of the deceased at the time of his death, and that such a grant is not, by virtue of section 41(2)(d) of the Evidence Ordinance, conclusive proof that the property in the schedule to the grant was owned by the deceased at the time of his death. The principal object of the schedule to the grant of Letters of Administration appears to be for the purpose of ensuring that correct security is given. It does not prove the deceased's title to the property schedule.

In the present case, eventhough the appellant was granted Letters of Administration in respect of the estate of Yap Hong Kai (deceased) and the said property was listed in the schedule annexed thereto, it does not mean that the said land was conclusively owned by the said Yap Hong Kai (deceased). Applying the principle laid down in *Chua Chee Chor*'s case, the respondent or any interested party may question the actual ownership of the said land. It is a triable issue, which need to go for trial.

b) Yap Hong Kai Died As An Undischarged Bankrupt

The said Yap Kong Kai (deceased) was an undischarged bankrupt at the time of his death. An adjudication order dated 30 April 1979 was made against him by the Kuala Lumpur High Court. The official assignee's office *vide* their letters dated 2 October 2000 and 12 October 2000 had confirmed the position. By virtue of that, all assets and liabilities of the bankrupt are vested with the official assignee. Only the official assignee has the *locus standi* to deal with any matter relating to his assets and liabilities. No one else can do it without the consent of the official assignee. Section 38(1)(a) of the Bankruptcy Act 1967, provides:

> Where a bankrupt has not obtained his discharge –
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee.

In *Ting Nguk Yong v. Bank Utama (M) Bhd* [1999] 1 CLJ 173, the court held that:

> Pursuant to s. 38(1)(a) of the Act, the OA must be consulted in any action intended by the bankrupt which may be detrimental to the bankrupt's creditors. As such it was incumbent that all dealings with the estate of the bankrupt be made through the OA who was the trustee for the said estate. No one has the right to interfere or intermeddle in the estate of the bankrupt without the prior sanction or consent of the OA. Whatever private arrangement made between the parties, or act done without reference to the OA would not be binding on the bankrupt's estate, and would stand invalid.

On those authorities, I am satisfied that this issue is very vital to determine the *locus standi* of the appellant in the present case. It is a triable issue that needs to be determined in full trial. The appellant had also argued in his submissions that since the said Yap Hong Kai (deceased) was an undischarged bankrupt at the time of his death and the said land was held by him (the deceased) as a trustee and administrator of the estate of Yap Swee King @ Yap Swee Kim @ Yap Swee Keng, then the official assignee need not administrator the said land and any dealing in respect of the said land does not require the sanction of the official assignee. I think this submission by the appellant is self – defeating. If the said land is not part of the said Yap Hong Kai's estate ie, it was not registered under his name at the time of his death, and still belong to the estate of Yap Swee King @ Yap Swee Kim @ Yap Swee Keng, then clearly the appellant has no *locus standi* to deal with the said land, unless he had obtained a grant of Letters of Administration *De Bonis Non* for the unadministered estate of Yap Swee King @ Yap Swee Kim

@ Yap Swee Keng. In fact a grant of Letter of Administration *De Bonis Non* in respect of the unadministered estate of Yap Swee King @ Yap Swee Kim @ Yap Swee Keng has been granted to one Yap Hong Lang @ Yap Fong Mei (the appellant's sister) by the Temerloh High Court on 20 January 2000.

Whether The Respondent Has Taken A Fresh Step After The Judgment In Default

The appellant also argued that since the respondent has taken a fresh step after being informed about the judgment in default, ie, by entering into a consent judgment, then the respondent has waived its right to have the said judgment in default set aside.

The said judgment in default was granted on 25 August 2000. It was first brought to the attention of the respondent on 12 September 2000. Immediately, within the prescribed time, the respondent filed its application to set it aside. All along until 23 September 2000 when the consent judgment was entered into, the respondent was challenging the said judgment in default. Even in the said consent judgment, the respondent insisted that there should be a provision that the said judgment in default should be set aside. So, by entering into the said consent judgment with one of its terms that the said judgment in default be set aside, the respondent cannot be said to have taken a fresh step that is inconsistent with its application to set aside the said judgment in default and thus the respondent has not waived its right to set aside the said judgment in default. In fact the main purpose of the respondent entering into the said consent judgment was to get the judgment in default set aside. The said judgment in default was more 'painful' compared to the consent judgment, as far as the respondent is concerned. In *Ong & Company Pte. Ltd. v. Ong Say Yaun* [1984] 1 CLJ 188 VC George J ruled that:

> Now, while I agree that in certain circumstances the taking of fresh steps could put paid to a party's procedural rights, the taking of such steps can be invoked successfully only if the fresh steps taken are inconsistent with the procedural right relied on. In the instant case the fresh steps said to have been taken by the defendant are not only not inconsistent with the application to set aside the default judgment but were taken towards getting the judgment set aside.

Application To Set Aside Consent Judgment

On 6 October 2000 the respondent filed in its application to set aside the consent judgment which was entered into on 23 September 2000. The grounds for the said application were as follows:

i) at the time when the said consent judgment was entered into on 23 September 2000, the respondent was not aware that the estate of the said Yap Hong Kai (deceased) was supposed to be administered by the official assignee, not by the appellant, because at the time of his death, the said Yap Hong Kai (deceased) was an undischarged bankrupt;

ii) the terms of the said consent judgment *inter alia*, involved some payments to be made to the appellant as an administrator of the estate of the said Yap Hong Kai as well as vacant possession of the said land to be handed over to the appellant, thus under the circumstances, the said consent judgment was invalid and to be set aside;

iii) that after the consent judgment was entered into on 23 September 2000 the respondent received a notice from the official assignee's office confirming the status of the said Yap Hong Kai as an undischarged bankrupt at the time of his death and directing that all dealings involving the deceased's assets and liabilities must be made through the official assignee; and

iv) that the said consent judgment has not been perfected yet.

The issue here is: Can a consent judgment be set aside?

In *Huddersfield Banking Co. Ltd. v. Henry Lister & Son Ltd.* [1895-1899] All ER 868, the Court of Appeal had ruled that:

> A consent order made by the court to give effect to the compromise of a legal claim by the parties concerned can be set aside, not only on the ground of fraud, but for any reason which would afford a ground for setting aside the agreement on which the order was base, e.g. on the ground of a common mistake regarding a material fact.

At p. 873, Lopes LJ had said:

> Then it is said that there was a consent order which was drawn up and passed, and that the court has no jurisdiction to set it aside. It appears to me that the two cases which have been cited are sufficient authority to show that it can be set aside. One was *Davenport v. Stafford*, and the other *A.G v. Tomline.* The law seems to be that a consent order may be set aside for the same reasons as those on which you may set aside an agreement. It appears to me that, directly a common mistake is established, you can set aside an agreement.

The above principle was followed by our Federal Court in *Tio Chee Hing v. Tractors Malaysia Bhd* [1973] 1 MLJ 66 and in another High Court case in *Syarikat Marak Jaya Sdn. Bhd. v. Masinda Sdn Bhd.* [1991] 1 CLJ 809.

In *Tio Chee Hing*'s case *(supra)*, the Federal Court held that:

> although as a general rule a consent order would operate as an estoppel, there are clear exceptions to this rule. A consent order may be set aside for the reasons sufficient to set aside an agreement.

In that case, Gill FJ had said:

> In *Wilding v. Sanderson*, the Court of Appeal held, *inter alia*, that an order made in an action by consent and based upon, intended to carry out, an agreement come to between the parties, can be set aside on any ground on which an agreement in the terms of the order could be set aside, and one of such grounds is mistake. Pretheroe J. followed these last two cases in *Au Yuan Chee v. Lee Thiam & Ors.* to hold that where it is established that a judgment has been obtained fraudulently or by reason of mutual mistake of the parties regarding a material fact, the court has the power to set aside the judgment.

In *Syarikat Marak Jaya Sdn Bhd. v. Syarikat Masinda Sdn Bhd (supra)*, Peh Swee Chin J (as he then was) aptly held that:

> Before an order has been perfected, the court has inherent jurisdiction to review the matter. This power is exercisable whether it is an order made in open court or in chambers, or whether the order is by consent so long as the order has not been perfected. When an order is extracted or perfected, the court can still review the same but only with the consent of both parties, or as expressly provided, by the Rules of the High Court, 1980.

Applying the above principles to the fact of the present case, I am satisfied that the Sessions Court has the power to set aside the consent judgment which was entered into on 23 September 2000 on the ground that there was a mistake regarding the status of the said Yap Hong Kai (deceased) as an undischarged bankrupt at the time of his death and the said judgment has not been perfected yet. The respondent has no knowledge that the said Yap Hong Kai (deceased) was an undischarged bankrupt when the said consent judgment was agreed upon. To proceed with the consent judgment under the circumstances may contravene the Bankruptcy Act 1967 which renders the said consent judgment invalid. It is only proper that the said consent judgment be set aside.

At one stage of his submissions, the appellant raised the issue of estoppel ie, the respondent, after having agreed to the consent judgment, is estopped from disputing it at a later stage and applying for setting it aside. I have discussed earlier as to why the said judgment in default should be set aside. There were valid reasons for doing so. Being an administrator of the estate of Yap Hong Kai (deceased) and the son of the said Yap Hong Kai (deceased) the appellant should have known that his late father was an undischarged bankrupt at the

time of his death. There is nothing to indicate that the appellant has no knowledge about the matter. At least the appellant should have disclosed about the matter when they negotiated for the consent judgment. That is a material non-disclosure. If it was disclosed in time before the consent judgment was entered into, at least the respondent would be in a position to know that the appellant has no *locus standi* in representing the estate of Yap Hong Kai (deceased), thus not to proceed with the consent judgment. In not disclosing the information that his late father was an undischarged bankrupt at the time of his death, the appellant was guilty of unconscionable conduct and this had the effect of releasing the respondent from any estoppel that may have otherwise be in the picture. The appellant who was guilty of unconscionable conduct cannot raise the issue of estoppel on the part of the respondent (see – Federal Court's decision in *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305). In that case, Gopal Sri Ram JCA (who was in the Federal Court panel), has said:

> The Plaintiffs were, therefore, guilty of unconscionable conduct and this had the effect of releasing the defendants from any estoppel that may have held them in its grip. Once thus released, the parties were placed on an equal footing *vis-a-vis* the litigation. Thereafter, it was open to the defendants to pursue any and all courses made available to them by adjectival law to rid themselves of the offending judgment.

Conclusion

Having given this matter careful consideration I am convinced that the learned Sessions Court judge Temerloh was right in setting aside both the judgment in default and consent judgment which are the subject matter of both the appeals *vide* Appeal No: 12-30-2000 and 12-30A-2000. As a result of the order, all the issues and defence on merits, which were discussed earlier, may now be tried fully. Accordingly, both the appellant's appeals be dismissed with cost and the decisions of the learned Sessions Court judge dated 1 December 2000 affirmed.